No. 97-1118 (3)

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1997

DANIEL P. BRESNAHAN,

Petitioner,

vs.

CALIFORNIA HIGHWAY PATROL; DEPARTMENT OF PERSONNEL ADMINISTRATION; CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN; STATE PERSONNEL BOARD; ASSISTANT COMMISSIONER FIELD ROBERT RENGSTORFF; OFFICER RONALD JONES; SERGEANT JAMES BALDUCKI; SERGEANT MICHAEL DOMINO; SERGEANT WESLEY BEAN; DEPUTY CHIEF CLARENCE TUCK; CAPTAIN GENE TOWLE; and DOES 1 through 100, Inclusive,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN

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STATEMENT OF THE CASE

The Petition seeks this Court's review of the Ninth Circuit Court's ruling affirming the District Court's opinion granting Summary Judgment in favor of the Respondent California Association of Highway Patrolmen ("CAHP"). Petitioner repeatedly contends that he did not have "any hearing" and as a result of due process was denied. Respondent CAHP contends that the fundamental requirement for due process is not whether a hearing was conducted but whether Petitioner had the *opportunity* to be heard at a meaningful time in a meaningful manner.

Petitioner is a State Traffic Officer with the California Highway Patrol ("CHP") who was temporarily removed from his flight status pending an internal CHP investigation into his performance as a helicopter pilot. Petitioner received a notice of administrative removal for cause, flight pay was discontinued, and he was reassigned. App. 29a.

CAHP is the exclusive representative and negotiation agent for all sworn members of the Department of California Highway Patrol. The Memorandum of Understanding ("MOU") was entered into on July 1, 1992 and is the agreement between the State of California and the CAHP. App. 30a.

Petitioner, a member of CAHP, was entitled to file an appeal pursuant to the provisions of Article V of the Grievance, Arbitration, and Complaint Procedures of the Unit 5 of the MOU. The MOU sets forth the grievance procedure which involves four levels/steps of appeal. If a member is not satisfied at the fourth level of appeal to the Department of Personnel Administration ("DPA") then he may appeal that decision to a neutral arbitrator jointly selected by the parties or selected by the American Arbitration Association of California State

Mediation Service. The arbitrator's decision is final and binding. App. 30a.

A. The Four Level/Step Grievance Procedure with Binding Arbitration meets due process requirements.

It is well established that "due process is flexible and calls for such procedural protection as the particular situation demands." *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976).

In *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, the Court held that a state confirmed property interest in continued employment cannot be deprived without due process of law. The Court found that the employer must provide a hearing; however, a hearing need not be elaborate.

> The essential requirement of due process . . . are notice and opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 545 (1985)

The requirements of due process are articulated in *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976):

> The fundamental requirements of due process is the opportunity to be heard "at a meaningful time in a meaningful manner". (Quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)

The lower court correctly determined as a matter of law that the four level/step grievance procedure that culminates with binding arbitration satisfies due process requirements and relied upon well settled law. App. 36a.

B. Petitioner had the opportunity to be heard at a meaningful time in a meaningful manner.

The lower court found that the Petitioner availed himself to four level/step grievance procedure as articulated in the MOU but failed to appear at arbitration. App. 36a. The District Court found that Plaintiff had the *opportunity* to appear at arbitration with private counsel before a neutral arbitrator and present evidence on his behalf. App. 36a. The Arbitration provided in the MOU is a full evidentiary hearing. App. 35a. The lower court correctly found that Petitioner had the *opportunity* to be heard in a meaningful hearing that comported with due process requirements of the Constitution of the United States. App. 36a. It was Petitioner who failed to avail himself to binding arbitration; a delay in selecting an arbitrator does not constitute a violation of due process. App. 37a.

C. There is no conflict between the United Supreme Court and the California Supreme Court as to due process.

The California Supreme Court has held that a decision to reassign a police officer to a lower paying position is per se disciplinary or punitive in nature and that the officer must therefore be afforded the "opportunity for [an] administrative appeal." *White v. County of Sacramento*, 31 Cal. 3d 676, 683-84 (1982). However, California Government Code § 3304(b) does not detail how the appeal process is to be implemented. Appeal processes can be formulated by the local agencies, *Stanton v. City of West Sacramento*, 226 Cal. App. 3d 1483, 1443 (1991), and "the adequacy of the appeal procedure forwarded must be measured according to the Constitutional due process principals." *Binkley v. City of Long Beach*, 16 Cal. App. 4th 1795, 1806 (1993). Under California law, Petitioner is entitled to an administrative appeal that provides due process. App. 34a. Since the lower court determined that the arbitration

procedure set forth in the MOU fully complied with the due process clause; there is no conflict.

D. There was no abuse of discretion by the lower court.

The Petitioner's fact bound claim that the courts below abused it's discretion does not warrant review by this Court. The decision below correctly applied the facts to well established law. Petitioner has failed to present admissible evidence to support his claim of denial of a meaningful opportunity to be heard. App. 36a.

CONCLUSION

The four level/step grievance and arbitration procedure set forth in the MOU fully complies with the due process requirements and Petitioner had the opportunity for a meaningful hearing in a meaningful manner. Petitioner has presented no admissible evidence to establish that his due process rights were violated. For the reasons given above, and for those given in Respondent Department of Personnel Administration's brief in opposition, the petition should be denied.

Respectfully submitted,

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